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No. 95-1680

# In the Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether treaties and statutes that prohibit the government from confiscating property belonging to the Organization of American States (OAS) prevent the forfeiture of assets that were deposited by the OAS in, and thus belonged to, a bank convicted of violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 73 F.3d 403. The opinion of the district court (Pet. App. 1b-12b) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on January 19, 1996. The petition for a writ of certiorari was filed on April 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On July 1, 1991, petitioner General Secretariat of the Organization of American States (OAS) deposited in the Barbados branch of Bank of Credit and Commerce International (Overseas) Limited (collectively with certain related entities, BCCI) a $10,000 draft drawn on petitioner's account at American Security Bank in Washington, D.C. On July 10, payment on the draft was received by Capital Bank in Miami, Florida, BCCI's correspondent bank. Pet. App. 2a. In the interim, bank regulators in several countries had jointly seized and shut down BCCI's operations, in the face of mounting evidence of BCCI's insolvency and its extensive involvement in criminal activities. Authorities cooperated thereafter on a worldwide basis to consolidate BCCI's assets and to coordinate a global distribution to BCCI's depositors and other creditors. *United States* v. *BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1187 (D.C. Cir.), cert. denied, 115 S. Ct. 2613 (1995).

Concerned that its account in Barbados would be frozen as a result of BCCI's financial collapse, petitioner directed American Security Bank to stop payment on the $10,000 draft. The stop payment order (received by Capital Bank on August 8, 1991) was reversed as untimely, however, and petitioner was unsuccessful in later attempts to seek repayment directly from BCCI and Capital Bank. Pet. App. 2a.

2. On January 24, 1992, BCCI pleaded guilty in the United States District Court for the District of Columbia to violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* Pet. App. 3a. In accordance with the plea agreement, the district court issued an order under

18 U.S.C. 1963 (Pet. App. 1c-7c) forfeiting all of BCCI's assets located in the United States, including the funds held by Capital Bank on BCCI's behalf. The plea agreement provided that half of the forfeited assets would be transferred to a global liquidation fund, and the other half would be used, *inter alia*, to offset losses suffered by the Federal Deposit Insurance Corporation's Bank Insurance Fund, and United States taxpayers generally, as a result of BCCI's unlawful activities. See *BCCI Holdings*, 46 F.3d at 1187.

3. On April 10, 1992, petitioner requested a hearing, under 18 U.S.C. 1963(*l*)(2) and (6)(A), to establish its right to $10,000 of the forfeited assets. Pet. App. 3a, 5b. After briefing and oral argument, the district court dismissed the petition on the ground that petitioner failed to assert a cognizable interest in any specific forfeited property, as required by Section 1963(*l*)(6)(A). Pet. App. 7b-12b.

4. The court of appeals affirmed. Pet. App. 1a-6a. It concluded that petitioner could not establish a qualifying interest in $10,000 of BCCI's forfeited assets because "bank depositors, as general creditors, have no interest in the specific accounts to which their deposits might be traced, only in the defendant's estate as a whole—and therefore can have no interest in particular assets forfeited, as required under * * * [Section 1963(*l*)(6)(A)], unless they have already secured a judgment against the debtor and perfected a lien against a particular item." Pet. App. 3a-4a (quoting *BCCI Holdings*, 46 F.3d at 1191).

The court of appeals rejected petitioner's argument that its legally protected status as an international organization had any bearing on whether it had an interest in the forfeited property. "[W]hen [peti-

tioner] deposited its money with BCCI, it gave up legal title to the money in exchange for a claim against BCCI for $10,000. Thus, the subsequent forfeiture worked no confiscation of [petitioner's] property because [petitioner] retained what it had before —a claim against BCCI for $10,000." Pet. App. 4a-5a.

**ARGUMENT**

1. Section 1963(*l*)(6)(A) permits a third party to challenge a criminal forfeiture on the ground that particular forfeited property actually belonged to the third party and not to the defendant. *United States* v. *Schwimmer*, 968 F.2d 1570, 1580 (2d Cir. 1992). Unless it establishes bona fide purchaser status, see 18 U.S.C. 1963(*l*)(6)(B), the third party claimant must prove (i) that it has "a legal right, title, or interest in the property" and (ii) that such interest "was vested in the [claimant] rather than the defendant or was superior to any * * * interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property." 18 U.S.C. 1963(*l*)(6)(A).[1]

Every court of appeals that has ruled on the issue has concluded that, in the ordinary course, a general unsecured creditor has no cognizable interest in specific forfeited property. See *BCCI Holdings*, 46 F.3d at 1191; *Schwimmer*, 968 F.2d at 581 (same); *United States* v. *Campos*, 859 F.2d 1233, 1239 (6th Cir.

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[1] Petitioner argued for the first time in the court of appeals that it was entitled to recover under Section 1963(*l*)(6)(A) because (it asserted) the money it deposited did not come into BCCI's possession until after BCCI had committed its RICO violations. Since petitioner failed to raise that argument in the district court, the court of appeals declined to entertain it. Pet. App. 5a n.2.

1988) (same); cf. *United States* v. *$20,193.39 U.S. Currency*, 16 F.3d 344, 346 (9th Cir. 1994) (unsecured creditors do not have standing to challenge civil forfeiture).[2] A general depositor, by virtue of the deposit, is a general creditor of a bank: when the deposit is made, the depositor relinquishes title to the funds deposited and obtains a claim against the bank for the deposited amount. See, *e.g.*, *Citizens Bank of Maryland* v. *Strumpf*, 116 S. Ct. 286, 290 (1995); *Bank of Marin* v. *England*, 385 U.S. 99, 101 (1966). Since general "depositors, as general creditors, have no interest in the specific accounts to which their deposits might be traced," it follows that they "can have no interest in particular assets forfeited, as required under both prongs of § 1963(*l*)(6)." *BCCI Holdings*, 46 F.3d at 1191.

2. Petitioner does not contend that its $10,000 deposit with BCCI was anything other than a general deposit. Petitioner does not dispute, moreover, that in the ordinary course a general depositor cannot establish either of the requirements of Section 1963(*l*)(6)(A). See Pet. 16. Petitioner argues, however, that its statutory and treaty rights as an

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[2] In *United States* v. *Reckmeyer*, 836 F.2d 200, 205, 206-208 (4th Cir. 1987), the court of appeals, considering an analogous forfeiture statute, held that where the government forfeits all of a debtor's assets general creditors have an interest in the forfeited property if that is their only means of recovery. Further, it held that a general creditor may be regarded as a bona fide purchaser and be entitled to recovery as such. We believe that the Fourth Circuit erred on both grounds. In any event, petitioner has not relied on either theory of recovery (or even cited *Reckmeyer*); the United States has not seized all of BCCI's assets; and petitioner does not contend that it is a bona fide purchaser.

international organization bestow upon it a privileged status, which permits it to challenge the forfeiture of BCCI's property to the extent that such forfeiture would frustrate BCCI's ability to repay petitioner's deposit. That argument is without merit. None of the rights possessed by petitioner affects the permissibility of the government's forfeiture under RICO of property in which petitioner had no cognizable legal interest.

a. The International Organizations Immunities Act (IOIA), 22 U.S.C. 288a, renders a qualified international organization's own assets immune from confiscation. See 22 U.S.C. 288a(c). Petitioner's reliance on that provision (Pet. 8) rests on the premise that, by effecting the forfeiture of BCCI's assets, the United States exercised dominion over petitioner's property. As this Court explained, rejecting an analogous claim in *Strumpf*, "[t]hat view of things might be arguable if a bank account consisted of money belonging to the depositor and held by the bank. In fact, however, it consists of nothing more or less than a promise to pay, from the bank to the depositor." 116 S. Ct. at 290. Nothing in the IOIA (or any treaty cited by petitioner) purports to give petitioner a property interest in funds placed by petitioner in a general deposit account. Accordingly, when petitioner deposited its $10,000 with BCCI, it exchanged legal title to those funds for a claim against BCCI. Although BCCI's United States assets have since been forfeited, BCCI remains liable to petitioner as a result of the deposit, and petitioner is entitled, like BCCI's other creditors,

to seek to recover its claim (or some proportion of it) in the ongoing worldwide liquidation proceedings.[3]

b. Petitioner's reliance (Pet. 6) on Article 138 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, is misplaced. That provision states that petitioner "shall enjoy * * * such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes." Pet. App. 1d. Although petitioner would surely benefit in this case by being deemed (contrary to well-established banking law) to be the owner of $10,000 of BCCI's assets, rather than a general creditor owed that amount, petitioner has not demonstrated that it cannot operate effectively in the United States when treated on a par with domestic depositors.

c. Petitioner's reliance (Pet. 7-8) on Article IV, Section 2, of the Headquarters Agreement Between the Government of the United States of America and the Organization of American States, May 14, 1992 (Headquarters Agreement), S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992), is similarly unavailing. The Headquarters Agreement did not enter into force until November 17, 1994—more than 18 months after the forfeiture—and it accordingly has no application in this case. Moreover, even if the Headquarters Agreement were applicable, the cited provision prohibits only the "requisition, confiscation, expropria-

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[3] There is no reason to believe that the position taken by the administrator of the BCCI Barbados branch that "only BCCI's assets in the United States were answerable to [petitioner's] claim" (Pet. 13) will preclude petitioner's recovery in the global distribution of BCCI's remaining assets.

tion [of] and any other form of interference" with property belonging to petitioner. See Pet. App. 2e.

d. At bottom, petitioner argues that, since it must as a practical matter deposit its funds in bank accounts, the forfeiture of bank assets that the bank acquired from petitioner's deposits "'confiscate[s]' * * * the assets of [petitioner], just as surely and effectively as if the United States Government had seized the currency in the petty cash strongbox at [petitioner's headquarters]." Pet. 14. In light of petitioner's ability to participate along with other BCCI creditors in the global distribution of BCCI's remaining assets (including half of the assets forfeited in the underlying RICO case), the effect on petitioner from the forfeiture in this case was not, even as a practical matter, equivalent to a governmental confiscation of petitioner's property. But even if petitioner were foreclosed from recovery in the global proceedings, petitioner's treaty and statutory immunities from *direct* confiscation of its own assets provide it with no basis to challenge *incidental* harms that it may suffer as the result of the forfeiture of property belonging to others. Those immunities would, of course, prevent the government from freezing or otherwise exercising dominion over petitioner's bank account, because the bank account —the claim that petitioner has against the bank by virtue of its deposit—is petitioner's property. The financial assets in the hands of the bank, however, belong to the bank, and petitioner's statutory and treaty protections do not purport to insulate petitioner from the effects of governmental action taken against third parties.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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